MOHD ONN MUDA

v.

SANIBOEY MOHD ISMAIL & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
MOHD GHAZALI J
[CIVIL SUIT NO: 22-62 OF 1997]
17 OCTOBER 1997

TORT: *Defamation - Publication of libellous material - Whether article was libellous - Words in natural and ordinary meaning - Whether defamatory - Test - Whether objective or subjective - By inference or implication*

TORT: *Defamation - Fair comment - Whether article justifiable - Whether fair comment and justification could be defence*

TORT: *Damages - Defamation - Whether compensatory or special or exemplary*

The plaintiff sued the defendants for damages for libel arising out of an article written by 1st defendant and published in a newspaper owned by the 2nd defendant. The plaintiff alleged that the said article as a whole inferred that the plaintiff had acted to shield or protect a gambling organiser from legal action and had in its natural and ordinary meaning conveyed that the plaintiff was corrupt, dishonest and unscrupulous in his actions. As a result the plaintiff was transferred to the police headquarters and was 'reverted' from acting deputy commissioner to the rank of senior assistant commissioner. He suffered loss and damage, and had been seriously injured in his reputation and was brought into public scandal, odium and contempt. The defendants admitted writing, publishing and printing the articles but argued that the said words were true in substance and in fact and so were justifiable. They submitted that the said article was printed to expose the tactics used by an unlawful gambling organiser to avoid the law and as such was fair comment upon a matter of public interest. The court had to decide whether the words were libellous and whether the defence of fair comment and justification were sustainable.

Held:

[1] Libel is defamation by means of writing, print or some permanent form. Whether the words complained of are defamatory of the plaintiff is a question of law for the court to decide, and in determining whether those words are defamatory, the court has to consider the natural and ordinary meaning of those words used. The test is whether the words were

calculated to expose the plaintiff to hatred, ridicule or contempt in the mind of reasonable men, or would tend to lower the plaintiff in the estimation of right thinking members of society generally.

[1a] The present action would fall within the type of cases in which the ordinary and natural meaning of the words only arise by inference or implication. Read together, the offending passages would by implication or inference convey to an ordinary reader that the plaintiff was in collusion with the gambling operator in his gambling activities and was protecting him. The imputation would be that the plaintiff, as a police officer, was dishonest and/or corrupt.

[2] Fair comment means comment honestly believed to be true, not inspired by any malicious motive, and not irrelevant. It must be based on facts truly stated. In the instant case, the burden of proof was on the defendants to adduce evidence, that the article was only an *expose* of the tactics used by an unlawful gambling organiser to avoid the law and as such was fair comment upon a matter of public interest. The defence of fair comment and justification were unsustainable as they were not proven.

[3] The test of whether the words complained of were defamatory is objective and not subjective, that is, whether the article to the ordinary reader to whom the publication is made, is likely to understand it in a libellous sense. That the article was published to expose the tactics used by an unlawful gambling organiser was irrelevant for the purpose of construing the words complained of.

[3a] The most libellous part of the article was the imputation that the plaintiff was not a 'clean' police officer and that was defamatory. The said words were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right thinking members of society.

[4] The offending passages each by themselves and cumulatively were therefore untrue and defamatory of the plaintiff and the defendants were liable to the plaintiff in damages.

[5] The plaintiff was transferred back to the police headquarters and was reverted to his substantive rank as a result of the article. Although the transfer was not a demotion, it had the effect of a demotion in that he had been reduced in rank and had suffered monetary loss. The plaintiff was therefore entitled to compensatory damages which would include special damages.

[5a] There was no evidence adduced that the 2nd defendant unduly gained financially from the publication of the libel and under the circumstances exemplary damages would not be awarded.

[Judgment to the plaintiff.]

Cases referred to:
Charleston & Anor v. News Group Newspapers Ltd & Anor [1995] 2 WLR 450 ***(refd)***
Chong Siew Chiang v. Chua Ching Geh & Anor [1992] 1 CLJ 1839 ***(refd)***
Datuk Patinggi Abdul Rahman Ya'kub v. Abang Mohammad bin Abang Anding [1979] 2 MLJ 185 ***(refd)***
JB Jeyaretnam v. Goh Chok Tong [1985] 1 MLJ 334 ***(refd)***
Jones v. Skelton [1963] 3 All ER 952 ***(refd)***
Joshua Benjamin Jeyaretnam v. Goh Chok Tong [1989] 3 MLJ 1 ***(refd)***
Morgan v. Odhams Press Ltd & Anor [1921] 1 WLR 1239 ***(refd)***
Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 ***(refd)***
Tan Sri Dato' Vincent Tan Chee Yioun v. Hj Hasan bin Hamzah & Ors [1995] 1 CLJ 117 ***(refd)***
The Capital and Counties Bank v. George Henty & Sons [1882] 7 App Cas 741 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 37(c)(i), 57, 114(g)
Federal Constitution, arts. 132(2), 140(6), 144(6)
Pensions Act 1980, s. 22

Other sources referred to:
A Digest of the Law of Libel and Slander, Odgers, 3rd edn, p 1
Concise Oxford Dictionary, 9th edn
Libel & Slander, Gatley, 8th edn, p 89
Osborn's Concise Law Dictionary, 7th edn
The Law of Defamation in Singapore and Malaysia, Keith R Evans, p. 53

For the plaintiff - Teh Poh Teik; M/s Teh Poh Teik & Co
For the defendant - Lorraine Cheah; M/s Shearn Delamore & Co

JUDGMENT

Mohd Ghazali J:

The plaintiff, who was at the material time, namely, 5 March 1994, the Chief Police Officer (CPO) of the State of Johor and holding the rank of Acting Deputy Commissioner, is suing the first defendant who was at the material time a journalist with the newspaper "Harian Metro" of which the second defendant, The New Straits Times Press (Malaysia) Berhad are the owners and the publishers thereof for libel published in 5 March 1994 issue of the "Harian Metro" (hereafter referred to as "Metro").

The alleged offending article (hereafter referred to as "the said article") in Metro read like this:

GUNA NAMA KETUA POLIS! Taktik penganjur judi bagi elak tindakan undang-undang

Oleh Saniboey Mohd Ismail

JOHOR BAHRU: **Nama Ketua Polis Johor, Timbalan Pesuruhjaya Mohd Onn Muda, dipercayai digunakan oleh seorang penganjur judi di Taman Kebun Teh di sini bagi mengelak dikenakan tindakan undang-undang.**

Penganjur judi berkenaan yang dikenali sebagai 'Tiger Tan' di kalangan pelanggannya, didakwa menjalankan kegiatannya setiap hari bermula jam 10 malam hingga awal pagi.

Sumber-sumber memberitahu Harian Metro, Tiger Tan yang dikatakan berusia dalam lingkungan 40 tahun, juga mendakwa Mohd Onn memberikan 'lesen' kepadanya untuk menganjurkan perjudian.

Menurutnya, rumah besar Tiger Tan yang terletak di Jalan Keruing di taman berkenaan dikatakan sering menjadi tumpuan lebih 20 kaki judi, termasuk beberapa rakyat Singapura.

Katanya, pelanggan di kalangan rakyat tempatan biasanya mengunjungi rumah itu dengan menaiki kereta mewah manakala kebanyakan rakyat Singapura datang ke situ dengan menaiki teksi.

Tiger Tan juga dikatakan menganjurkan sebuah lagi tempat perjudian berhampiran sebuah bengkel di Jalan Ayer Molek di sini.

"Difahamkan, sindiket judi itu hanya bermain judi 'Pai Kow' setiap kali berkumpul dan ia membabitkan pertaruhan beratus-ratus ribu ringgit," katanya.

Malah, tinjauan *Harian Metro* di kawasan rumah berkenaan beberapa malam lalu mendapati ia cerah dan dua lelaki kelihatan berkawal di pintu pagar.

Seorang daripada lelaki terbabit akan berada di dalam kawasan rumah berkenaan manakala seorang lagi yang menggunakan telefon mudah alih berada di kawasan luar.

Sumber-sumber itu berkata kegiatan judi itu pernah disiasat oleh polis daerah, termasuk membuat pemerhatian berhampiran kawasan rumah berkenaan.

Bagaimanapun, katanya, apabila mengetahui kegiatannya disiasat, Tiger Tan tanpa rasa takut dikatakan akan memberitahu pegawai polis yang mengetuai siasatan bahawa kegiatannya sudah 'dilesenkan' oleh Ketua Polis Johor.

The plaintiff claimed that in the said article the first defendant falsely and/or maliciously reported and the second defendant falsely and/or maliciously published the words – as underlined above – concerning the plaintiff which words in their natural and ordinary meaning and/or by way of innuendo meant and were understood to mean the following:

(i) that the plaintiff is and/or has been associating with the said Tiger Tan and is giving and/or given the said Tiger Tan protection;

(ii) that the plaintiff is giving and/or has given the said Tiger Tan a "licence" to operate the gambling dens and/or is granting and/or has granted the said Tiger Tan favours and that the plaintiff is thereby corrupt;

(iii) that the plaintiff is colluding and/or has colluded with the said Tiger Tan in the gambling activities and that the said Tiger Tan is and/or has been strongly supported by the plaintiff.

The plaintiff claimed that by reason of the publication of the said words he has suffered loss and damage, has been seriously injured in his reputation and has been brought into public scandal, odium and contempt. He stated that on 12 April 1994, he received a transfer order whereby he was relinquished of his post as the CPO of Johor and was transferred to Police Headquarters, Bukit Aman, Kuala Lumpur (hereafter referred to as "Bukit Aman") within twenty-four hours. Thereafter he reverted back and/or was demoted to the rank of Senior Assistant Commissioner I. It is his contention that the transfer and subsequent reversion/demotion was contributed by the publication of the libellous article by the first and second defendants. By reason of the aforesaid he now claims from the defendants:

(a) compensatory damages;

(b) special damages; and

(c) exemplary damages.

In their statement of defence the defendants admitted having published the said article but contended that the title was not the words "GUNA NAMA KETUA POLIS" in isolation but was in conjunction with the words "Taktik penganjur judi bagi elak tindakan undang-undang". The defendants averred that the said words published were directed at Tiger Tan and not at the plaintiff and as such deny that the words referred to or were understood to refer to the plaintiff. They also denied that the said words were defamatory or were capable of having an innuendo meaning as alleged. It is their stand that the said article purported only to represent the claims made by the said Tiger Tan and to report the nature of his activities.

In the alternative, it is their contention that the said words are in the natural and ordinary meaning true in substance and in fact, namely:

(a) the article was an expose of the tactics used by Tiger Tan to avoid the law;

(b) Tiger Tan has claimed to have been authorised or licenced to conduct his activities by the Johor Chief of Police.

The evidence show that the plaintiff, who was born in Kelantan on 25 December 1941, joined the police force as a probationary inspector on 1 November 1962. He rose from the ranks culminating in being appointed the CPO of Johor on 4 October 1993 with the rank of Acting Deputy Commissioner whilst his substantive rank was Senior Assistant Commissioner I having been confirmed as such on 19 November 1992.

In his evidence, he stated that he was put to great shame and was injured in his reputation when the said article appeared in Metro on 5 March 1994. He claimed that the said article gave the impression that he was a police officer who practised double-standards, namely, on the one hand claiming that he was a person who was against gambling activities and corrupt practices and on the other was in collusion with a gambling operator by the name of Tiger Tan which would denote that he is a corrupt person. He felt great shame when he met his family members whilst on visit to Kelantan on 5 March 1994 and when he met his men whilst visiting the outlying police stations on the islands off Mersing, Johor on 7 March 1994 which was during the fasting month.

On 8 March 1994, whilst he was in Mersing, he was summoned to meet the Inspector General of Police (IGP) that very same day with regards to the said article and at that meeting denied having any association with the said Tiger Tan. The Director of the Criminal Investigation Department and the Deputy Director of Management in charge of disciplinary matters were also present. According to the plaintiff, the IGP commented that the said article was defamatory of him and may smear his name and that of the police force. When asked as to what would be his next course of action, the plaintiff stated he informed the IGP that he will be consulting a lawyer to initiate civil proceedings against the defendants. In the course of that meeting the name of an acquaintance of his, namely, one Chua Siew Meng was raised and as instructed, he consequently wrote a letter (exh. P11) to the IGP giving the background of that person and his relationship and simultaneously denying that that was the person allegedly referred to as Tiger Tan in the said article.

On the following day, ie, 9 March 1994, he called for a press conference where he denied having any association with the person referred to as Tiger Tan and announced his intention to take legal action to vindicate himself. On 16 March 1994 he lodged a police report which reads:

> Saya telah membaca Harian Metro Edisi Johor keluaran 5 Mac 1994 dimuka surat 4 ruangan 1, dengan tajuk besar "GUNA NAMA KETUA POLIS" yang antara lain menyatakan "sumber sumber memberi tahu Harian Metro, Tiger Tan yang dikatakan berusia dalam linkongan 40 tahun, juga mendakwa Mohd Onn memberikan "Lesen" kepadanya untuk mengajurkan perjudian". Tindakan Tiger Tan yang saya telah memberi dia "lesen" untuk mengajurkan perjudian adalah tidak benar sama sekali. Dengan membuat dan menyiarkan kenyataan itu dalam Harian Metro dinyatakan di atas telah mencemarkan nama baik saya dan dengan itu saya membuat lapuran supaya tindakan yang sewajarnya dapat diambil.

In the following month, by letter dated 12 April 1994, the plaintiff received notification from the Director of Management, acting on behalf of the IGP, that he was transferred back to Bukit Aman with his present rank of Acting Deputy Commissioner being reverted back to his substantive rank of Senior Assistant Commissioner I. The transfer was to take effect within twenty-four hours. On 14 April 1994 he reported for duty at Bukit Aman.

On 31 December 1994 he left the police force by going on optional retirement at the age of 53 on his substantive rank of Senior Assistant Commissioner I. Although he did not state the reason for wanting to go on optional retirement in his application form (pp. 37-38 of the Agreed Bundle of Documents), which according to him was left blank upon the advice of a police clerk who assisted him in filling the form, it was his stand that he left as he could no longer face his colleagues.

The plaintiff claimed that as a result of the transfer wherein he reverted back to his substantive rank of Senior Assistant Commissioner I, he suffered monetary loss, namely:

(a) the monthly acting allowance;

(b) a reduced monthly housing allowance;

(c) a reduced monthly entertainment allowance;

(d) the special grade monthly allowance of RM1,000 paid to police officers on special grade 'C' .

To support his claim on the monetary loss that he suffered, the plaintiff adduced all his pay-slips for the relevant months prior to his retirement.

In cross-examination, the plaintiff agreed that his confirmation would depend upon the IGP and the Police Force Commission. He also stated that the time frame to confirm an officer placed on an acting rank varies. He then insisted that throughout his career he has never experienced a reversion from an acting rank to a substantive rank except for the occasion at hand. He also insisted that he was never informed of the reason for his transfer to Bukit Aman.

It was also the stand of the plaintiff that he would have been confirmed on his acting rank of Deputy Commissioner and that he was sent to Johor on that acting rank with a view to promotion. He claimed that as far as he knew, Tun Hanif, who was the former IGP, had recommended that he be confirmed on that rank of Deputy Commissioner. He was also of the view that his chances of being confirmed was bright.

In his evidence, SP2, one ASP Huzir bin Mohamed who was attached to the Personnel Records Unit, Bukit Aman stated that reverting back to a substantive rank from an acting rank was tantamount to a demotion. Besides tendering a certified copy of the plaintiff's record of service (exh. P9), SP2 stated that the records show that the plaintiff had in his career received three letters of commendation, a Federal award and state awards from Kelantan and Selangor. He also confirmed that no disciplinary action has ever been taken against the plaintiff throughout his career.

In her evidence, SP3, who was then the Deputy to the Officer in Charge of Criminal Investigations (OCCI) attached to Police Headquarters, Johor Bahru stated that she was instructed by the OCCI to commence investigations into the report lodged by the plaintiff on 16 March 1994. In the course of investigations she was informed by one Inspector Mohd Noor of the Anti-Vice Section that Tiger Tan is a person who manages a pub called "Smiling Lounge". She subsequently interviewed the said Tiger Tan who denied knowing the plaintiff or being involved with gambling activities.

SP4, a specialist writer with the New Straits Times (NST) confirmed that he had written an article about the plaintiff which appeared in the NST on 26 February 1994. What inspired him to write that article was that the town of Kluang was rife with talk of a raid on a gambling den, which was located quite near the Kluang police station, having been personally conducted by the plaintiff. He stated that his article was based upon what was told to him by the plaintiff and SP3.

SP5, who was at the material time working as a reporter with Utusan Malaysia, confirmed that she had written an article about the plaintiff entitled "Harimau Kelantan mengganas di Johor" which appeared in 3 March 1994 issue of Utusan Malaysia.

The only witness for the defence was one Othman bin Talib, a police officer holding the rank of Senior Assistant Commissioner II who was attached to the Service Section, Bukit Aman. He confirmed that the records show that the plaintiff has never faced any disciplinary action neither was there an investigation conducted against him in 1994. He explained that a police officer would be placed on an acting rank allocated to a higher post if he is ordered

to carry out the duties required of that post on a full-time basis. He then produced a copy of a circular (exh. D10) issued by the Service Section of Bukit Aman which is a reproduction of Service Circular No. 7 of 1993 issued by the Public Services Department. That circular lay down the guidelines to be followed by the public services when embarking upon an exercise to fill vacant posts in accordance with the new remuneration system. It is stated therein that whenever a post falls vacant, it may be filled by an officer within the service who would be eligible or is qualified to be appointed to the higher rank allocated to that post. The officer can be placed in that post on an acting capacity on a full-time basis (para. 4). That circular further states that an officer placed under such circumstances will have the opportunity to prove his capability and suitability to be considered for promotion but that such an eventuality is not guaranteed (para. 5). Paragraph 8 of the circular provides that the body responsible to carry out such an exercise where it involves police officers holding the rank of Assistant Commissioner and above is a committee called a Jawatankuasa Pertukaran/Penempatan Pegawai Kanan Polis the members of whom are the following police force dignitaries, namely:

(i) the IGP as chairman;

(ii) the Deputy IGP and all departmental Directors as members;

(iii) the Director of Management as secretary.

That circular also lay down the guidelines to be followed with regard to emplacement of serving officers to "cover" a post in the eventuality of a vacancy. It is stated therein that an officer who is directed to "cover" another post will be duty bound to carry out the duties as required of that post in addition to the duties required of him in his current posting, ie, he will be responsible to carry out the duties of both the posts. That concept is to be adopted only when the vacancy which has occurred is expected to be temporary or for a short period. It is also stated therein that a person who "covers" that vacant post may be of a lower or higher rank or even of similar rank. He will however only receive a charge allowance when he is directed to "cover" that post.

DW1 then stated that he was of the view that the transfer of the plaintiff from Johor Bharu to Bukit Aman was not tantamount to a demotion as defined in general order 13 of Chapter A of the General Orders which deals with appointments and promotion within the public services and which have been adopted by the police force. He was also of the view that the plaintiff's transfer to a post carrying his substantive rank cannot be said to be a demotion as an officer can only be demoted after undergoing disciplinary action in accordance with Chapter D of the General Orders. However under cross-

examination he agreed that if an officer placed on an acting capacity performs well he will be confirmed in that post. He also agreed that an officer who reverts back to his substantive post from an acting post will suffer monetary loss.

It would be pertinent to state here that the relevant part of general order 13 of Chapter A of the General Orders, which are regulations made pursuant to art. 132(2) of the Federal Constitution and which regulations have been adopted by the police force, provides that an officer who is confirmed in his post, having been appointed to a new post but fails to get confirmed in that new post may be allowed by the Commission – which in the instant case would be the Police Force Commission – to return to his former post or another similar post provided there is a vacancy and that the reason for his failure to get confirmed is not due to unsatisfactory conduct. That officer will be allowed to receive the remuneration due to the post in which he has been confirmed. The provision reads:

> **Kembali ke jawatan asal.**
>
> Seseorang pegawai yang sudah disahkan dalam jawatan asalnya tetapi apabila dilantik ke satu jawatan baru telah gagal untuk mendapat pengesahan dalam jawatan tersebut boleh dibenarkan oleh Suruhanjaya kembali semula ke jawatan asalnya atau ke satu jawatan yang serupa dengan syarat ada kekosongan dalam jawatan tersebut dan bahawa kegagalannya untuk mendapat pengesahan itu bukanlah kerana kelakuan yang tidak memuaskan. Seseorang yang telah dikembalikan sedemikian akan dibenarkan menerima gaji yang ia patut menerima sekiranya ia tidak dilantik ke jawatan lain itu. ...

Chapter D of the General Orders deals with conduct and discipline, the procedure to be adopted when taking disciplinary action and modes of punishment which includes demotion.

According to *Osborn's Concise Law Dictionary* (Seventh Edn) the word "libel" means "defamation by means of writing, print, or some permanent form". According to the same dictionary, defamation is "the tort consisting in the publication of a false and derogatory statement respecting another person without lawful justification" and "a defamatory statement is one exposing him to hatred, ridicule or contempt, or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, profession or trade". Thus it would be correct to say that a libel consists of a defamatory statement or representation in permanent form. It would seem from the authorities referred to by counsel that for the plaintiff to succeed in his suit, he must prove the following requisites:

(i) the words must be defamatory;

(ii) the words must refer to the plaintiff; and

(iii) the words must be published.

Thus the main issue before me is whether the words complained of are defamatory of the plaintiff as publication has been admitted by the defendants. On this issue, counsel for the defendants submitted that the said article is not defamatory of the plaintiff on the grounds that the words complained of in the passages underlined above do not bear any of the meanings alleged in para. 5 of the statement of claim, ie,:

(i) that the plaintiff is an associate of Tiger Tan and is giving him protection;

(ii) that the plaintiff has given Tiger Tan a "licence" to operate gambling activities, is granting him favours and is corrupt;

(iii) that the plaintiff is in collusion with Tiger Tan in his gambling activities and is strongly supporting him.

She contended that the article was an expose of the tactics used by an unlawful gambling organiser to avoid the law, and as such was fair comment upon a matter of public interest.

On the law, counsel submitted that the test to be applied when considering whether a statement is defamatory of a plaintiff is an objective one where it is based on the meaning in which a reasonable man would understand them. She then referred to Gatley on *Libel and Slander* (Eighth Edn) at p. 89 which read:

> 88. Objective test. What imputation is conveyed by any particular words is to be determined on an objective test, that is, by the meaning in which the ordinary reasonable man would understand them.

Counsel then referred to the case of *The Capital and Counties Bank v. George Henty & Sons* [1882] 7 App Cas 741 at p. 745, which was also referred to in Gatley's, wherein it was held by Lord Selborne that "The test, according to the authorities, is, whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense."

Counsel argued that it is clear to the ordinary man reading the headline and the title to the said article that it refers to "tactics" used by the organiser of gambling activities to avoid the law. She submitted that the title does not

suggest that the plaintiff has actually been associating with Tiger Tan or has been giving him protection as alleged by the plaintiff. Neither does it suggest that the plaintiff has actually granted a "licence" to Tiger Tan to operate illegal gambling activities. She submitted that all it states is the tactic used by Tiger Tan to avoid the law. She pointed out that the word "taktik" is defined in *Kamus Dewan* (3rd Edn) as "cara atau keadah untuk memperoleh, mencapai, atau mendapatkan sesuatu tujuan yang dikehendaki, muslihat, siasat ...". Thus the natural and ordinary meaning of the word "taktik" therefore suggests that the use of the name of the CPO of Johor by Tiger Tan was to avoid action being taken against him, and does not suggest that the plaintiff was actually working with Tiger Tan.

She then contended that the main thrust of the said article concerns the gambling syndicate run by Tiger Tan and sets out the details of the gambling operation itself. Thus an ordinary man reading the article would not come to the conclusion that the plaintiff had been associating with Tiger Tan or had been giving protection to Tiger Tan. She pointed out that all that can be inferred from the article is that in order to avoid legal action, Tiger Tan had been audacious enough to use the name of the plaintiff.

Counsel submitted that arguably, if the defendants has stated that no action had be taken by the police against Tiger Tan then it could be inferred from the article as a whole that the plaintiff had acted to shield or protect Tiger Tan from any legal action. However no such suggestion was made by the first defendant in the said article and it is their submission that reading the article as a whole, a reasonable man would not consider it libellous of the plaintiff.

She pointed out that the plaintiff has not alleged that the defamatory meanings were due to a legal innuendo but have relied on the natural and ordinary meaning of the words or a "false" innuendo, which in other words, is the natural inferential meaning of the words complained of, and under these circumstances the court considers the words complained of based on the "reasonable man test" described above.

She then referred to the case of *Charleston and Anor v. News Group Newspapers Ltd and Anor* [1995] 2 WLR 450 at p. 451 where Lord Nicholls of Birkenhead held:

> The law adopts a single standard for determining whether a newspaper article is defamatory: the ordinary reader of that newspaper.

In deciding whether an ordinary reader would consider the words complained of in the said article as defamatory, counsel submitted that the following facts should be considered by the court:

(1) Apart from the plaintiff, the other witnesses for the plaintiff did not state that they were of the view that the article contained words which they considered to be defamatory of the plaintiff nor did they at any time during the testimony indicate that they were of the view that the contents of the said article lowered the plaintiff in their estimation.

(2) On the contrary, two journalists for the NST and Utusan Malaysia respectively (SP4 and SP5) gave glowing accounts of the plaintiff's performance as the CPO of Johor.

(3) The plaintiff also adduced several newspaper articles which reported on the plaintiff's intention to reduce the crime rate in Johor as well as his actions against illegal gambling in the state. All these reports are complimentary on the plaintiff and can be presumed to have been read by members of the public.

(4) The plaintiff has admitted in cross-examination that the press played an important role in the police force's efforts to fight crime and that it was important for the press to report police activities as well as the criminal activities that took place in Johor.

Under such circumstances, counsel submitted that there is no reason why the said article should be any different from the other articles as it informs the public and the police of the tactics used by Tiger Tan to escape prosecution and arrest, and an ordinary reader would be aware that it is not uncommon for a person to claim acquaintance or authorisation from people in power and authority in order to avoid prosecution.

In relation to the evidence of SP3, ie, the Deputy OCCI who investigated the report lodged by the plaintiff, counsel contended that the person she interviewed whom she claimed was Tiger Tan had denied being involved with gambling activities. Counsel pointed out that it is unlikely that a person being interviewed as such would admit his involvement unless confronted with irrefutable evidence of the crime. Furthermore SP3 stated that she had previously seen that person in the "Smiling Lounge" which was located on the ground floor of Hotel Malaya in Jalan Meldrum whereas in the said article it was alleged that Tiger Tan conducted his activities in Jalan Keruing, Taman Kebun Teh and also in Jalan Ayer Molek. She then contended that as "Tiger Tan" is only a nickname, it is possible that there is more than one person in Johor Bahru known as Tiger Tan and that it was possible that the person interviewed by SP3 was not the same Tiger Tan referred to in the said article.

On the whole it is the stand of the defendants that the said article itself does not contain any meaning that could be considered defamatory of the plaintiff and cannot be construed as containing any of the meanings as alleged in the statement of claim as discussed earlier. Counsel also pointed out that the only evidence given at the trial concerned the plaintiff's feelings and the plaintiff's feelings alone. No evidence has been given regarding the reaction of his family members when he visited them in Kelantan on 5 March 1994 nor of the reaction of his fellow officers whom he had visited in the district of Mersing on 7 March 1994. She insisted that since no evidence was given regarding the reaction of any third party towards him, the feelings of the plaintiff and his reactions are immaterial to the issue whether the article complained of was defamatory of the plaintiff.

In his submission, counsel for the plaintiff insisted that the said article in its natural and ordinary meaning conveys to the reader that the plaintiff is:

(i) corrupt;

(ii) unfit to hold the position of the CPO of Johor;

(iii) a hypocrite who practices double-standards;

(iv) dishonest;

(v) not a man of integrity.

He argued that the words complained of convey to the reader that the plaintiff, as CPO of Johor, is closely linked to the gambling activities conducted by Tiger Tan and has in fact "licenced" him to do so. It shows that the plaintiff has abused his position in granting Tiger Tan immunity from police actions. Counsel also submitted that the said article ridicules the plaintiff and carried the innuendo that the plaintiff was unscrupulous in his actions. In short, it portrays the plaintiff as an unprincipled and a dishonourable CPO of Johor.

He then referred to the several newspaper articles, which formed part of the Agreed Bundle of Documents and which were published prior to the said article, and submitted that those articles reflect the plaintiff's stand with regards to vice and gambling, namely, he was crusading against those activities. Counsel also referred to the notes of two press conferences arranged by the plaintiff on 4 December 1993 and 25 February 1994, which also formed part of the Agreed Bundle of Documents, wherein the plaintiff warned gambling operators of the dire consequences. He pointed out that it was also in evidence that the plaintiff personally conducted a raid on a gambling den in Kluang and that his action was commended by SP4, ie, the specialist writer with the NST. He also referred to the evidence of SP5, ie, the journalist with Utusan

Malaysia, who was the author of the article entitled "Harimau Kelantan mengganas di Johor". That article appeared in Utusan Malaysia on 3 March 1994 and the plaintiff was quoted therein as having said the following:

> Saya mahu memberi amaran kepada pengusaha-pengusaha kelab hiburan dan perjudian di negeri ini supaya jangan cuba nak bermain-main dengan polis.
>
> Saya seorang yang anti judi dan anti maksiat. Jangan jadikan negeri ini pusat perjudian dan pelacuran," tegas anak jati Kelantan ini.

Counsel pointed out that it was against this back-drop that the said article containing the words complained of appeared on 5 March 1994. He then urged the court to infer that the offending article was purposely designed to appear on 5 March 1994 to convey a disparaging imputation.

As stated earlier, the main issue before me is whether the words complained of are defamatory of the plaintiff. If they are defamatory, the question of damages will arise. Counsel for the plaintiff submitted that this is a question of law for the court to decide and that in determining whether the words complained of are defamatory, the court has to consider the natural and ordinary meaning of the words used. He then referred to the case of *Tan Sri Dato' Vincent Tan Chee Yioun v. Haji Hasan bin Hamzah & Ors* [1995] 1 MLJ 39. In that case Mokhtar Sidin J (as he then was) said that the court has a duty to consider and determine whether the words complained of are defamatory and that this is a question of law for the court to decide; he said (at pp. 49-50):

> The defendants, when they gave evidence in court, admitted writing, publishing and printing those articles. Though the plaintiff had contended that the statements in those articles are defamatory and no defence had been filed except by the seventh defendant, the court has a duty to consider and determine whether those statements are defamatory of the plaintiff. In determining this the court has to consider the natural and ordinary meaning of the words used in the articles and determine whether they are capable of conveying a defamatory meaning of and concerning the plaintiff. This is a question of law for the court to decide as clearly held by the Privy Council in the case of *Jones v. Skelton* [1963] 3 All ER 952 at p. 958; [1963] 63 SR (NSW) 644 at p. 650:
>
> It is well settled that a question whether words which are complained of are capable of conveying a defamatory meaning is a question of law and is therefore one calling for decision by the court ... (*In Capital and Counties Bank v. Henty* [1882] 7 App Cas 741 at p. 745, Lord Selbourne said:)
>
> > The test according to the authorities is whether under the circumstances in which the writing was published, reasonable men to whom the publication was made, would be likely to understand it in a libellous sense.

As to what is meant by defamatory words, Mokhtar Sidin J (at p. 50) quoted Odgers on *A Digest of the Law of Libel and Slander* (3rd Edn 1896) *Stevens & Sons Ltd*, at p. 1 where it was stated:

> No man may disparage or destroy the reputation of another. Every man has a right to have his good name maintained unimpaired. This right is a *jus in rem*, a right absolute and good against the world. Words which produce, in any given case, appreciable injury to the reputation of another are called defamatory. Defamatory words, if false, are actionable. False defamatory words, if written and published, constitute a libel; if spoken, a slander. Words which on the surface of them must injure the reputation of the person to whom they refer, are clearly defamatory, and, if false, are actionable, without proof that any particular damage has followed from their use.

In the instant case the plaintiff is contending that the words complained of are defamatory in their ordinary and natural meaning – such a meaning has been described as a "false innuendo". Hence the first step is to decide whether the words complained of in their natural and ordinary meaning were defamatory of the plaintiff. In *JB Jeyaretnam v. Goh Chok Tong* [1985] 1 MLJ 334 Thean J was of the view that this issue is purely one of construction – he said (at p. 336):

> The first issue is one purely of construction of the words complained of, and the approach to such a construction is to consider the meaning such words would convey to ordinary reasonable persons using their general knowledge and common sense; it is not confined to strict literal meaning of the words but extend to any reference or implication from which persons can reasonably draw. As said by Lord Morris in *Jones v. Skelton* [1963] 3 All ER 952, 958 at p. 958:
>
> > The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v. Daily Telegraph, Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.
>
> Together with the ascertainment of the natural and ordinary meaning of the words complained of to be considered is the question whether they were defamatory of the plaintiff. The test here is whether the words were calculated

> to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would "tend to lower the plaintiff in the estimation of right-thinking members of society generally" (per Lord Atkin in *Sim v. Stretch* [1936] 2 All ER 1237, 1240).

On the surface of it, I would agree with counsel for the defendants that the said article refer mainly to the said Tiger Tan but it cannot be denied that to a great extent it also refer to the plaintiff. Looking at the said article in the format that it was presented in Metro at p. 4 on the said date, I am of the view that an ordinary reader would not pay very much attention to the article or would have thought nothing about it if the headline and title had merely stated that the newspaper had tumbled upon an illegal gaming establishment in the town of Johor Bahru or words to that effect. However with the headline printed in large bold characters with the words "GUNA NAMA KETUA POLIS", that, in my view, would surely have attracted or enticed the ordinary reader to peruse or at least glance through the said article. The title itself, which was also printed quite prominently, read "Taktik penganjur judi bagi elak tindakan undang-undang" and that, to me, would be an added attraction to the headline which would draw the attention of the ordinary reader.

In her submission, counsel for the defendants has enlightened me as to meaning of the word "taktik" in Bahasa Malaysia and had contended that it would be clear to an ordinary man reading the title that the article refers to "tactics" used by the organiser of gambling activities to avoid the law. It is clear that the word "taktik" is the equivalent of the word "tactic" found in the English language and the meaning attached to that word as found in the *Concise Oxford Dictionary* (Ninth Edn) is as follows:

> 'tactic' 1. a tactical manouvre;
>
> 'tactics' ... 2a. the plans and means adopted in carrying out a scheme or achieving some end. b. a skilful device or devices.

To me, the meaning of the word "taktik" in either language do not seem to differ very much and in my view, that word as used in the context of the title to the said article would have attracted the ordinary reader. It would have aroused his curiosity and he would like to know how a gambling operator could avoid the law by using the name of the CPO as that is what the headline and the title simply suggest.

With regards to its contents, the first passage of the said article which is one of the offending passages clearly refer to the plaintiff by his rank and name. It informs the reader that a certain gambling operator in Taman Kebun Teh is believed to have used the plaintiff's name and position to avoid the law. The article then went on to inform the reader that the gambling operator is

known by the name of "Tiger Tan" amongst his "clients" and that his activities commence at 10pm until the early hours of the morning.

In the third passage of the article which is also one of the offending passages, the writer informs the reader that "sources" have informed Metro that Tiger Tan, who is believed to be in the fourties in age, has claimed that the plaintiff has "licenced" him to carry on with his gambling operation. The plaintiff is again referred to by name in that passage.

The following passages in the article then went on to describe what was told by one "source", namely:

(a) that the gambling operation was being carried out in a big house in Jalan Keruing and that some of Tiger Tan's "clients" were Singaporeans;

(b) that the local "clients" came in expensive cars whereas the Singaporeans mainly came by taxi.

The "source" is also quoted as having said that Tiger Tan is believed to be running a similiar establishment near a "bengkel", ie, a workshop or a small factory, in Jalan Ayer Molek and that they only play the game of 'Pai Kow' involving "hundreds of thousands of ringgit".

The article then inform the reader that Metro carried out their own surveillance for a few nights and discovered the house, although it is not clear which establishment the first defendant was referring to, was brightly lit and guarded by two male persons, one of whom was on guard within the compound of the house and the other, armed with a mobile telephone, was on guard outside the compound. The article went on to inform the reader that Metro's "sources" said that the said gambling activities had been investigated by the district police and that they had been making observations near the compound of the house.

Finally the reader is informed in the last passage of the article which is another of the offending passages that a "source" had stated that upon being informed that his activities are being investigated, Tiger Tan had without fear informed the police officer heading the investigation that his activities have been "licenced" by the CPO.

It is clear from para. 5 of the statement of claim that the plaintiff is contending that the words complained of as found in the offending passages are defamatory in their ordinary and natural meaning. It is also clear that the present action would fall within the type of cases in which the ordinary and natural meaning of words only arise by inference or implication.

Counsel for the defendants have contended that the words complained of do not bear any of the meanings alleged in para. 5 of the statement of claim, ie,:

(i) that the plaintiff is an associate of Tiger Tan and is giving him protection;

(ii) that the plaintiff has given Tiger Tan a "licence" to operate gambling activities, is granting him favours and is corrupt;

(iii) that the plaintiff is in collusion with Tiger Tan in his gambling activities and is strongly supporting him.

She insisted that the article was an expose of the tactics used by an unlawful gambling organiser to avoid the law, and as such was fair comment upon a matter of public interest. She also pointed out that the defendants have pleaded, in the alternative, that the words complained of are in the natural and ordinary meaning true in substance and in fact the particulars of which are:

(a) the article was an expose of the tactics used by Tiger Tan to avoid the law;

(b) Tiger Tan has claimed to have been authorised or licenced to conduct his activities by the CPO of Johor.

The defendants however have not explained by evidence that the words complained of were not understood in a defamatory sense. The first defendant who was present throughout the proceedings chose not to give evidence. The second defendant also chose not to come forward and enlighten the court on the said article. In relation to this, counsel for the plaintiff had in his submission even urged the court to invoke s. 114(g) of the Evidence Act against the defendants.

Be that as it may, as discussed earlier, the question as to whether the words complained of are defamatory of the plaintiff is a question of law for the court to decide, and in construing the words complained of as found in the offending passages in their natural and ordinary meaning and in considering the meaning such words would convey to ordinary reasonable persons using their general knowledge and common sense, I am of the view that they do have the meanings ascribed to them as alleged by the plaintiff in para. 5 of his statement of claim, ie, the words were defamatory. To me, read together, the ordinary and natural meaning of the words complained of found in the offending passages would by implication or inference, convey to an ordinary reader that Tiger Tan, a gambling operator, is blatantly carrying on with his gambling activities without any fear of police action as he is closely associated

with the CPO of Johor who has given him permission to carry on. The imputation that the plaintiff is in collusion with Tiger Tan in his gambling activities and is strongly supporting him is clear in the last passage of the article. The conclusion that the plaintiff is protecting Tiger Tan can reasonably be drawn from the second and last offending passages, namely, that Tiger Tan has been "licenced" by the plaintiff to carry on with his gambling activities and that all Tiger Tan need to do, when faced with a police investigation, is to inform the head of the investigation team that he is "licenced" by the plaintiff and nothing will come out of it, ie, the police team will not pursue the matter any further. The imputation here would be that the plaintiff, as a police officer, is not a clean person as he is protecting Tiger Tan, a gambling operator who is in such a favoured position to carry on with his gambling activities that no police officer can arrest him the moment he mentions the plaintiff's name. By not being a clean police officer would to the ordinary reader denote that that person is dishonest and/or corrupt.

On the whole I would agree with counsel for the plaintiff that all the defences failed. With regard to the defence that the said words are true in substance and in fact, I would agree that this amounted to a defence of justification. What is justification? *Osborn's Concise Law Dictionary* (7th Edn) states:

> (1) The plea in defence of an action which admits the allegations of the plaintiff but pleads that they were justifiable or lawful. For example, in libel a plea of justification admits the publication of the defamatory words, but pleads that they are true in substance and in fact.

For the defence to succeed the defendants must adduce evidence to prove it and I would think that by not calling the first defendant to prove the truth of the words complained of, the defence of justification should fail. In Tan Sri *Dato' Vincent Tan Chee Yioun v. Haji Hasan bin Hamzah & Ors* which was cited earlier, Mokhtar Sidin J was of the view (at p. 58) that in order to succeed in the defence of justification, fair comment and privilege, evidence must be adduced in respect of these. Since the defendant concerned in that case did not give any evidence on those issues, he held that that defendant had abandoned them.

I would agree with the view of the learned judge in that case and that being so, I would accept the contention of counsel for the plantiff that the defence of fair comment as pleaded by the defendants should also fail. What is fair comment? *Osborn's Concise Law Dictionary* states, *inter alia*: "A fair comment on a matter which is of public interest, or is submitted to public criticism, is not actionable as defamation (q.v.). The burden of proof is on the defendant setting up the plea. Comment is of the nature of criticism or

opinion and must be distinguished from a statement of fact. Fair comment means comment honestly believed to be true, not inspired by any malicious motive, and not irrelevant. It must be based on facts truly stated.".

On the defence of fair comment, counsel for the plaintiff had made reference to p. 53 of *The Law of Defamation in Singapore and Malaysia* by Keith R. Evans where it was stated that the following must be proved in order to succeed on such a defence, namely:

(i) the words complained of must be fair comment;

(ii) the comment must be based on facts;

(iii) the comment or opinion expressed must be fair; and

(iv) the comment must be on a matter of public interest.

In *Joshua Benjamin Jeyaretnam v. Goh Chok Tong* [1989] 3 MLJ 1 the Privy Council held (at p. 3):

> It is of course well established that a writer may not suggest or invent facts and then comment upon them, on the assumption that they are true. If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail. The commentator must get his basic facts right.

In the instant case, counsel for the defendants pointed out that the article was only an expose of the tactics by an unlawful gambling organiser to avoid the law, and as such was fair comment upon a matter of public interest. As the burden of proof is on the defendants I cannot see how such a defence can stand at all as they have failed to adduce any evidence on this plea.

On the whole, I would agree with counsel for the plaintiff that the defence of fair comment and justification advanced by the defendants are unsustainable as they remain unproven. As discussed earlier, whether the words complained of are defamatory is a question entirely for the courts. That the article was published to expose of the tactics used by an unlawful gambling operator is irrelevant for the purposes of construing the said words as the test is objective and not subjective. To put it another way, the test is simply whether the article, to the ordinary reader to whom the publication was made, would be likely to understand it in a libellous sense.

The words complained of by the plaintiff must be considered in the context of the article as a whole and looking at the words complained of, I am of the view that the most libellous part of the article is the imputation that the plaintiff is not a clean police officer. To impute that the plaintiff is dishonest is clearly defamatory. To me, the said words were calculated to expose him

to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally following the test as laid down by Lord Atkin in the case of *Sim v. Stretch (supra)*. Under the circumstances, I find that the words complained of in their natural and ordinary meaning were defamatory of the plaintiff and bore the meaning as ascribed by the plaintiff in para. 5 of his statement of claim. Since the offending passages, each by themselves and cumulatively are therefore untrue and defamatory of the plaintiff in the minds of right thinking people, the defendants are liable to the plaintiff and that being so, the question of damages now arise.

The plaintiff claims for the following types of damages:

(a) compensatory damages (general damages);

(b) special damages;

(c) exemplary damages.

According to *Osborn's Concise Law Dictionary*, general damages are that kind of damage which the law presumes to follow from the wrong complained of, and which need not be set out in the plaintiff's pleadings whereas special damages are damage of a kind which is not presumed by law but must be expressly pleaded and proved. As to exemplary damages it states "In certain classes of case the court may award exemplary damages not only by way of compensation but as a punishment to the offender".

In *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56, Mohamed Azmi J (as he then was) quoting Gatley on *Libel and Slander* said (at pp. 59-60):

> In a libel, damages are presumed. Gatley at p. 599 para. 1380 says:
>
> > In an action of libel 'the assessment of damages does not depend on any legal rule'. The amount of damages is 'peculiarly the province of the jury,' who in assessing them will naturally be governed by all the circumstances of the particular case. They are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, ... and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow 'for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused.' They should also take into account the evidence led in aggravation or mitigation of damages.

In *Datuk Patinggi Abdul Rahman Ya'kub v. Abang Mohammad bin Abang Anding* [1979] 2 MLJ 185 in relation to damages in libel actions, Seah J (as he then was) said (at p. 187):

> In a libel action, the general rule is that damages are assessed on a compensatory basis. However, in certain circumstances, exemplary damages, or punitive damages as they are otherwise described (see *Cassel & Co Ltd v. Broomee & Anor* [1972] AC 1027, 1073, 1125 at p. 1073 per Lord Hailsham) may be awarded.
>
> Compensatory damages may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantage which result, or may be thought likely to result, from the wrong which has been done. They may also include the natural injury to his feelings – the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self-confidence, these are proper elements to be taken into account in a case where the damages are at large. But these matters may not be taken into account as a reason for giving punitive damages (see para. 1360). In short, compensatory damages may include special damages and if aggravating circumstances exist, aggravated damages can also be awarded.

Following the principles stated above, it is clear that the task of assessing damages is to approach it broadly and the amount of damages to be awarded will depend on all the circumstances of each case.

What was the effect on the plaintiff due to the publication of the libel? In his evidence he stated that on 8 March 1994, whilst he was on a visit to Mersing, he was summoned to meet the IGP that very same day with regards to the said article. To me, being summoned as such by the IGP at such a short notice and under such circumstances, it being the fasting month, shows the seriousness of the occasion and the effect that the publication was having on the plaintiff's superior officers. This can be seen from the fact that even the Director of Criminal Investigation Department and the Deputy Director of Management in charge of disciplinary matters were present when the plaintiff met the IGP.

At that meeting the plaintiff stated that the IGP asked him whether he had read the said article. He answered in the affirmative and denied being involved with what was stated in the article. He stated that the IGP commented that the article was defamatory of him (the plaintiff) and may smear his name and that of the police force. The plaintiff then called for a press conference the next day to deny having any association with the said Tiger Tan. Subsequently

on 12 April 1994 he received a notification that he was to be transferred within twenty-four hours to Bukit Aman. The effect of the transfer was that he reverted back to his substantive rank of Senior Assistant Commissioner I.

The question arising is whether the transfer was the effect on him due to the publication of the libel. It is the stand of the plaintiff that he was demoted when he was transferred to Bukit Aman and reverted back to the rank of Senior Assistant Commissioner I. On this issue, counsel for the defendants submitted that the claim of the plaintiff that he was demoted cannot hold water. She insisted that SP2, ASP Huzir bin Mohamed, who was merely responsible for safekeeping of the plaintiff's service records, was not in a position to state that reverting back to a substantive rank from an acting rank is a demotion. She pointed out that DW1, Senior Assistant Commissioner II Othman bin Talib, who was attached to the Service Section, Bukit Aman and was SP2's superior officer, was of the view that both the plaintiff's transfer and his reversion to his substantive rank was not considered a demotion and this view is supported by the service circular pertaining to the concept of emplacement of an officer on an acting rank (exh. D10).

Counsel for the defendants also submitted that DW1 had in his evidence referred to PU(B) 621 which is a copy of a notification dated 2 December 1985 issued by the Minister of Home Affairs as Chairman of the Police Force Commission which was published in the *Gazette*. That notification is entitled "Suratcara Perwakilan Fungsi-Fungsi, Kuasa-Kuasa, Tugas-Tugas dan Tanggungjawab-Tanggungjawab Tertentu" and was made pursuant to arts. 140(6)(b) and 144(6) of the Federal Constitution which basically provides that the Police Force Commission may delegate its duties and responsibilities to a committee. That notification purports to delegate, *inter alia*, certain powers relating to disciplinary action but excluding, *inter alia,* the powers of dismissal and demotion, to a committee to be chaired by the IGP. I have perused the notes that I have taken down during the trial and nowhere could I find any reference of this notification being made by DW1 as suggested by counsel. Be that as it may, I do not see any reason why I cannot refer to this notification. Section 37(c)(i) of the Evidence Act 1950 read together with s. 57 of the same Act provides, *inter alia,* that when the court has to form an opinion as to the existence of any fact of a public nature, any statement of it made in a recital contained in any printed paper purporting to be the *Gazette* printed under the authority of the Government of Malaysia is a relevant fact, and is a fact of which the court shall take judicial notice. In other words, the said notification is not evidence but a fact which the court has to take judicial notice.

Anyway, counsel submitted that the only body which can reduce the plaintiff in rank is the Police Force Commission and there is no evidence that any action was taken by the Police Force Commission to reduce the plaintiff in rank. She pointed out that it is clear from that *Gazette* notification that the IGP does not have the power to reduce in rank, reduce in salary or defer the increment of any police officer and hence insisted the decision by the IGP to transfer the plaintiff and revert him back to his substantive rank cannot be said to be a demotion.

She then pointed out that the only evidence that the plaintiff was expected to be confirmed on his acting rank of Deputy Commissioner was given by the plaintiff himself and since promotion is not automatic, his expectation of being confirmed and further prospects of being elevated to even another higher rank in the police force would be irrelevant to the issue of damages.

In relation to the plaintiff's claim for special damages, counsel for the defendants submitted the law is clear on the issue of special damages in claims of tort, ie, the plaintiff is required to plead the heads of damages and quantum and the burden of proof is on the plaintiff to show that special damage was actually suffered as a result of the defendant's article.

She then submitted that in the event the court decides that the defendants are liable in defamation, aggravated and/or exemplary damages are not suitable in this case because:

(a) the defendants have not acted in any manner both before and during the trial which justifies the award of aggravated damages against them;

(b) exemplary damages are awarded under only two circumstances and these two circumstances do not exist in this instance.

With regard to (b) above, she referred to the case of *Chong Siew Chiang v. Chua Ching Geh & Anor* [1992] 1 CLJ 1839 where Richard Malanjum J said:

> In respect of exemplary damages, they may be awarded 'apart from cases where they are prescribed by statute, for two categories only:
>
> (i) ... (acts of governmental staff);
>
> (ii) where the defendant's tortious act has been done "with guilty knowledge, for the motive that the chances of economic advantage outweigh the chances of economic or perhaps physical penalty.
>
> It must be the plaintiff himself who suffers by such conduct, if he is to receive punitive damages.' (See Gatley on *Libel and Slander* - 8th Edn para. 1454).

She then contended that the plaintiff's claim for RM2 million as compensatory damages is excessive and not justified bearing in mind that the plaintiff originally filed his claim in the Sessions Court where it is clear that the damages contemplated by him, both general and special, was below RM250,000.

On the whole counsel submitted that the plaintiff has failed to show any documentary evidence which would substantiate his allegation that he was demoted. Further, the plaintiff has also failed to prove that the said article published by the defendants was the cause of his transfer to Bukit Aman and the reversion to his substantive rank.

It is my view that the said article was the catalyst which activated the whole matter resulting in the transfer of the plaintiff to Bukit Aman. The evidence show that the plaintiff was posted to Johor Bahru to be the new CPO of Johor on 4 October 1993 on the rank of Acting Deputy Commissioner. He claimed that the transfer was with a view to promotion and this claim was not challenged or rebutted by the defendants. Even DW1 stated in his evidence that "if a candidate performs well on acting Deputy Commissioner of Police he will be confirmed".

I would agree with the contention of counsel for the defendants that promotion is not automatic as this would be in line with the service circular referred to earlier (exh. D10) which states that there is no guarantee that an officer who is placed on an acting rank will be confirmed. But then again, that circular also states that an officer placed as such will have the opportunity to prove his capability and suitability to be considered for promotion. In relation to this the evidence show that the plaintiff had only been holding the post of CPO of Johor for less than seven months before he was transferred to Bukit Aman. The plaintiff has stated that he did not know the reason for his transfer but be that as it may, the fact that he was ordered to vacate his post within twenty-four hours would certainly raise eye-brows within the police force. DW1 had stated in his evidence that a twenty-four hour transfer is nothing extraordinary. With due respect to him, I cannot fathom that. I would have thought that such a transfer order would be understandable if, for example, a sudden vacancy had occurred due to death or a sudden resignation or that it was a transfer within the same station or district but surely not one from Johor Bahru to Kuala Lumpur and involving a senior officer at that.

The service circular (exh. D10) states that when a person is sent on acting he will have the opportunity to prove his capabilities, but his chances on being confirmed in that rank, which would amount to a promotion, is not guaranteed. It must be remembered that the circular only provide guidelines and from my

reading of the circular, I am of the view that placing a person on an acting capacity on a higher rank is the preliminary act towards confirming that person on that rank when a promotion exercise is carried out by the Police Force Commission provided there is nothing adverse against him during the period when he is on acting, eg, he has been found guilty by a disciplinary board, or is facing a criminal charge and has been interdicted.

Looking at the evidence it is my view that the chances of the plaintiff being confirmed on the rank of Deputy Commissioner was bright. He has been confirmed on the rank of Senior Assistant Commissioner I on 19 November 1992 and had been on the rank of Acting Deputy Commissioner as CPO of Johor from 4 October 1993. He had managed to serve as CPO of Johor for a period of about six months and ten days before that fateful day when he was transferred to Bukit Aman within twenty-four hours. He has claimed that he was made an Acting Deputy Commissioner with a view to promotion and this claim was not challenged or rebutted. The evidence also show that he has an unblemished service record and that he has never faced any disciplinary action. He was eligible and qualified to fill, on an acting capacity, the post of the CPO of Johor which carries the rank of Deputy Commissioner and, to me, the evidence show that he had all the requisites to be confirmed on that rank. He had almost reached the age of fifty-two when he was placed on that acting rank and unless something drastic happens, I cannot see anything to impede the plaintiff from being confirmed on that rank even before he reaches the age of compulsory retirement, ie, fifty-five years in accordance with general order 64 of Chapter A of the General Orders.

I would agree that when the plaintiff reverted back to his substantive rank as a result of the transfer it was, pursuant to Chapter D of the General Orders, not a demotion as a demotion would denote that disciplinary action had been instituted against the plaintiff and that he has been found guilty and that that was the punishment meted out whereas there is no evidence of such a happening. But then, the effect of such a move, as discussed earlier, would in my opinion raise eye-brows within the police force and would seem to have the same effect as a demotion, namely, the plaintiff has been reduced in rank and simultaneously has suffered monetary loss. According to general order 34(a) of Chapter B of the General Orders which deals with allowances and other remuneration, an officer placed to fill a post carrying a higher rank than his substantive post on an acting capacity and on a full-time basis is entitled to receive an acting allowance. He would also enjoy the other perks and privileges available to that posting.

At the trial, the plaintiff adduced his pay-slips for the months between March 1994 to December 1994 to show that he suffered monetary loss as a result of the transfer. His pay-slip for the month of April 1994 which, to me, has not been adjusted as yet for that month to reflect that he reverted back to his substantive rank of Senior Assistant Commissioner I, show that on the rank of Acting Deputy Commissioner as CPO of Johor he received the following remuneration:

(i) a basic salary of RM4,092;

(ii) an entertainment allowance of RM1,300;

(iii) a housing allowance of RM1,000;

(iv) a special grade allowance of RM1,000-00; and

(v) an acting allowance of RM738.

For the month of December 1994, ie, the last month prior to his retirement and whilst on his substantive rank of Senior Assistant Commissioner I, he received the following remuneration:

(i) a basic salary of RM4,422

(ii) an entertainment allowance of RM650; and

(iii) a housing allowance of RM650.

For that month of December, the plaintiff has also received a bonus of RM4,422 which would seem to be equivalent to one month's basic salary and which I believe is paid annually as his pay-slip for the earlier months do not reflect that remuneration.

In relation to his claim for special damages, para. 9 of the statement of claim reads:

(B) PARTICULARS OF SPECIAL DAMAGES

(i) Loss of perks and salary at RM2,500-00 per month with effect from 15th April 1994 and still continuing full quantification of the same will be proved at the trial.

The plaintiff's claim for special damages is for monetary loss which he suffered from 15 April 1994, ie, the date he resumed duty at Bukit Aman as a result of the transfer, and which is "still continuing" – he had filed his action prior to his retirement. What is clear from his pay-slips is that the plaintiff, as the CPO of Johor on the rank of Acting Deputy Commissioner, did receive a monthly acting allowance in addition to the salary that he has been receiving

based upon his substantive rank, higher housing and entertainment allowances and the special grade allowance which is payable to those who are on that rank of Deputy Commissioner. The plaintiff testified that his monthly total loss was RM2,223.

Counsel for the defendants has suggested that the transfer could have been due to the letter (exh. P11) which the plaintiff forwarded to the IGP as directed with regard to his relationship with one Chua Siew Meng and that there could also be a possibility that that person was the said Tiger Tan. I have perused the letter and I find that such a suggestion is unfounded. In that letter the plaintiff explained to the IGP the background of the said Chua Siew Meng whose name had been raised at the meeting he had with the IGP on 8 March 1994. He had stated therein that the said Chua Siew Meng was an acquaintance of his since 1979 when he was serving in Kelantan. That person had later stayed with him when he was staying in a rented house in Johor Bahru and had subsequently incorporated a company in February 1994 with two other persons by the name of Tan Ah Seng and Wong Nyuk Ho to carry on a business. The plaintiff had denied therein that either of the three persons named above was the same person known as Tiger Tan and he even gave their particulars such as their identity card numbers and addresses. I do not see the need to delve further into the letter seeing that it has no bearing upon the matter before me. If at all that letter was the cause of the transfer, I would have expected the police department to take disciplinary proceedings against the plaintiff pursuant to the provisions of Chapter D of the General Orders on the ground that he is associating with an acquaintance who happens to be a businessman if such an association was tantamount to conduct unbecoming of a police officer.

What is clear to me is that the plaintiff has an unblemished record as evidenced by his record of service (exh. P9). He had served in the police force for about 32 years and as Acting Deputy Commissioner was holding one of the 4th senior rank available in the police force, the most senior being that of the IGP. His record of service denote that he is an experienced officer who has served in several states in the country and I would think that he would have stayed on with the police force until he reaches the age for compulsory retirement if not for the effect of the said article upon him. He has stated in his evidence that he chose to leave the police force on optional retirement as he could no longer face his colleagues. I am of the view that the stigma caused by the defamatory imputations in the article which has tended to lower him in the estimation of his colleagues and those who know him will be there for a long time and will remain so notwithstanding that he is now retired. On the whole I am satisfied that his reputation and feelings have been injured and hence he should be entitled to damages assessed on a compensatory basis.

The plaintiff is claiming, *inter alia,* for exemplary damages which according to the authorities referred to earlier are also described as punitive damages. *Osborn's Concise Law Dictionary* states that in certain classes of case the court may award exemplary damages not only by way of compensation but as a punishment to the offender. In *Chong Siew Chiang v. Chua Ching Geh & Anor*, which was cited earlier, Richard Malanjum J said:

> Restraint should be exercised in assessing exemplary damages. In assessing such damages there must be no double counting and no question of adding together sums fixed as compensatory damages and as exemplary damages. Before considering any exemplary damages it must be considered first whether the sum in mind for compensatory damages would be adequate. If it is not, in view of the outrageous conduct of the defendant and to indicate disapproval of such conduct and as a deterrence, an additional sum may be added to bring the sum sufficient as punishment.

The learned judge did not grant any exemplary damages in that case – he said:

> I am not satisfied that the defendants published the libel with full knowledge of undue benefits either financially or otherwise. No doubt there are aggravating factors but they do not justify the award of exemplary damages to the plaintiff. There was also no evidence adduced that the second defendant unduly gained financially from the publication of the libel.

Under the circumstances of the instant case, I am also of the view that exemplary damages should not be awarded as there is nothing to show that the defendants have benefitted financially or otherwise from the publication of the libel.

The plaintiff is of course entitled to compensatory damages and in assessing the amount of damages to be awarded I would include the monetary loss that he suffered when he was transferred back to Bukit Aman. The monetary loss that he suffered in the form of acting and other allowances, which he has shown from his pay-slips, is about RM2,200 per month for the period between 15 April 1994 and 31 December 1994. The total amount would be about RM18,700. It must also be remembered that he had retired at the age of fifty-three although he could have remained in the police force for another twenty-four months. As the CPO of Johor his pay-slip for the month of April 1994 show that his monthly remuneration including allowances totalled RM8,130. His basic salary for the month of December 1994 was RM4,422 and as from January 1995 he should have been receiving a monthly service pension of RM2,211 in accordance with s. 22 of the Pensions Act 1980. Taking into account that he had another twenty-four months to go if he had remained in

the service before attaining the age of fifty-five and taking into account his pension, I am of the view that he could have earned an extra amount of RM142,056 (RM8,130 - RM2,211 x 24).

In *Datuk Patinggi Abdul Rahman Ya'kub v. Abang Mohammad bin Awang Anding* which was cited earlier, Seah J (as he then was) was of the view that compensatory damages may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantages which result, or may be thought likely to result, from the wrong which has been done, or in short, compensatory damages may include special damages. In that case, the learned judge held that the higher the plaintiff's position, the heavier the damages will be. He then awarded the plaintiff, the Chief Minister of Sarawak then, a sum of $25,000 as compensatory damages for two letters published and sent to the Prime Minister of Malaysia and the Yang Di-Pertua Negeri, Dewan Undangan Negeri Sarawak. That defamatory article was however only in the form of a letter which to me would denote that the extent of the publication was limited whereas in the instant case, the publication is a daily newspaper which seemed to have wide coverage as even the IGP who is stationed in Kuala Lumpur seemed to be aware of the said article.

In *Tan Sri Dato Vincent Tan Chee Yioun v. Haji Hasan bin Hamzah & Ors*, which was referred to earlier, the plaintiff who "is a prominent and successful businessman who is recognized not only in Malaysia but also internationally" was awarded a total of RM10 million as general damages. In assessing the damages in that case, the learned judge took into acccount the following factors:

(i) the position and standing of the plaintiff;

(ii) the gravity and seriousness of the libel;

(iii) the mode and extent of the publication;

(iv) the mental distress, hurt, anxiety and mental anguish caused to the plaintiff as a result of the libel;

(v) the uncertainty undergone in litigation;

(vi) the conduct of the defendants from the time of the libel down to the very moment of the verdict; and

(vii) the absence or refusal of any correction, retraction or apology.

In *Morgan v. Odhams Press Ltd & Anor* [1921] 1 WLR 1239 the House of Lords held that the wider the extent of the publication, the heavier the damages will be.

I have not however been referred to any local case law in relation to defamation suits where the plaintiff is a member of the public services. The plaintiff in the instant case was a senior police officer. He belonged to a uniformed branch of the public service where discipline and integrity are essential qualities. As a public servant I would think that he is more vulnerable to being defamed and may normally not be in a position to reply if his credit and reputation is damaged by a defamatory article in the local newspapers as pursuant to general order 19 of Chapter D of the General Orders, he would need to seek the permission of his superiors before making any public announcement to refute the article. His only resort to obtain relief will be the courts and even then he has to seek the permission of his superiors if he propose to institute civil proceedings.

Having taken into account the monetary loss that he suffered and also the natural injury to his feelings and the mental pain and suffering and the fact that he left the police force not under a happy note and with the stigma of not being confirmed as Deputy Commissioner, I am of the view that compensatory damages in the sum of RM350,000 would be fair and adequate to vindicate him to the public including his former colleagues in the police force and console him for the wrong done. I would also order interest on the amount at the rate of 8% per annum from the date of judgment to the date of full recovery. The defendants are also ordered to pay costs to the plaintiff.

Reported by Anne Soh